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F. William McGinn v. Utah Power and Light Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

F. WILLIAM McGINN II,
Plaintiff-Respondent,

v.

UTAH POWER & LIGHT COMPANY, a Maine corporation,
Defendant-Appellant.

Case No. 13619

BRIEF OF APPELLANT

Appeal From an Order of the Third District Court
In and For Salt Lake County, Utah
The Honorable Marcellus K. Snow, Judge

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NATURE OF THE CASE

This is an action for personal injuries sustained by the plaintiff when the mast of a sailboat he and four others were carrying from a county road to the north shore of Bear Lake (in Idaho) came in contact with defendant's electric power line.

DISPOSITION IN LOWER COURT

The case was submitted to the jury pursuant to the Idaho comparative negligence statute. The jury found the plaintiff sixty (60%) percent negligent and the defendant forty (40%) percent negligent. The lower court entered a judgment of no cause of action. Plaintiff's motion for new trial was granted. Defendant's petition for an intermediate appeal to this court was granted.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the order granting a new trial and reinstatement of the judgment of no cause of action.

STATEMENT OF FACTS

This action for personal injuries arose out of an accident that occurred on the north shore of Bear Lake in Bear Lake County, Idaho, on July 23, 1972.

The defendant owns and operates a pumping plant at the north end of Bear Lake which is commonly known as Camp Lifton (Exs. 36-D, 38-D and 43-D; R. 434). The pumping plant is used to pump water out of Bear Lake into the North Lake and Bear River to be used for irrigation and hydroelectric generation (R. 731, P. 509). There is a county road which traverses the causeway at the north end of Bear Lake (Exs. 32-D, 34-D, 48-D). The causeway separates

Bear Lake from North Lake. The Idaho State Park is located on the north shore of Bear Lake approximately three-quarters of a mile east of Camp Lifton (Ex. 48-D; R. 442). The state park is located on land owned by the defendant and leased to the State of Idaho (Exs. 80-D, 81-D, 82-D). The park is equipped with facilities such as picnic tables, culinary water, rest rooms, charcoal grills and a boat jetty with a cement ramp on the end which is used to launch boats (Exs. 19-D, 20-D; R. 436). Kirk Rich, who was employed by the Idaho Department of Parks as a park ranger at the Idaho State Park during the summers of 1970, 1971 and 1972, testified he had seen hundreds of boats launched from the boat jetty (R. 455). The Idaho State Park has been a public facility since 1963 (R. 445). The boat jetty was constructed in 1964 and 1965 (R. 455). The state park is approximately one and three-quarters miles in length (R. 435).

Although camping and boating facilities were available in the Idaho State Park east of Camp Lifton, the accident occurred in an area just west of Camp Lifton. *This area is also owned by the defendant* (R. 228). The area west of Camp Lifton is "sandy and hilly" and covered with weeds (R. 689, 664). There are three separate power lines which run parallel to the north shore of Bear Lake west of Camp Lifton (Exs. 32-D, 34-D). There is a "230 KV line" which crosses the county road just west of Camp Lifton and is located along the north side of the county road, a "12 KV line" which is located along the south side of

the county road and a "46 KV line" which is located further south of the county road (R. 733-734, P. 511-512; Exs. 32-D, 34-D).

The mast of the boat being carried by the plaintiff and his companions came in contact with the 46 KV line (Ex. 43-D).

The 46 KV line was originally constructed in 1913 and rebuilt on the same alignment in 1957 (R. 784, P. 586). The National Electric Safety Code, which controls the construction and maintenance of electric power lines, requires a minimum vertical clearance of 21 feet at sixty degrees temperature for a 46 KV line (R. 784, P. 586). The line in question was constructed to provide 26 feet of vertical clearance at 120 degrees temperature (R. 784, P. 586).

The 46 KV line, as built, exceeded the vertical clearance requirements of the National Electric Safety Code by five feet at twice the temperature (R. 784, P. 586). *This clearance existed on the date of the accident.* (R. 712, P. 490). The 46 KV line is inspected by fixed-wing aircraft every month, by helicopter once every six months and by walking inspection once every year (R. 329). The annual walking inspection was performed on July 10, 1972 (R. 330). There were no defects found in this section of the line (R. 330-331).

Two weeks before the accident happened, Richard Ricks (hereinafter "Ricks"), a friend of the plaintiff F. William McGinn (hereinafter "McGinn"), drove to Bear Lake to find a camp site (R. 691). Ricks drove

through the Idaho State Park and observed the facilities but decided it would be crowded over the July 24th weekend. He selected the area west of Camp Lifton for the weekend party (R. 692). Ricks made a map of the north end of the lake and indicated the camp site on the map (R. 577). The map was given to McGinn (R. 577).

There were no camping or boating facilities west of Camp Lifton (R. 459-460). However, people did use the area for picnicking and swimming particularly on holiday weekends when the state park was crowded (R. 438). Local people from St. Charles, Paris or Montpelier, Idaho, made daytime use of the area (R. 725, P. 503). There were no Utah Power and Light signs in the area west of Camp Lifton (R. 438, 542).

None of the witnesses who testified had ever seen a boat carried from the county road to the lake west of Camp Lifton.

On Saturday evening, July 22, 1972, McGinn and his date, Sarah Gittens (hereinafter "Gittens"), drove to Bear Lake in McGinn's car (R. 577). Ricks and his date, Lana Omura (hereinafter "Omura") drove to Bear Lake in Ricks' car (R. 683). Ricks was pulling a motorboat behind his automobile (R. 684). James McNeil (hereinafter "McNeil") drove to Bear Lake alone in his car trailing the catamaran sailboat which was involved in the accident (R. 643; Exs. 47-D, 50-D). McGinn and Ricks and McNeil are all fraternity brothers (R. 616).

McGinn was not able to locate the camp site from the map but met Ricks in the Idaho State Park (R. 639). Ricks directed McGinn out of the state park to the area west of Camp Lifton (R. 635-636). McGinn and Gittens slept on the beach in an area approximately half way between the county road and water's edge (Ex. 57-D). This area is almost directly under the 46 KV line. Ricks and Omura slept near the water's edge so they could secure the motorboat which he had launched at the Utah State Park (on the west side of Bear Lake) and brought to their camp site. McNeil slept on the trampoline on his sailboat which was parked just south of the county road (R. 646; Ex. 57-D).

Gittens testified that just before she went to sleep she "noticed" a buzzing sound (R. 636). She asked McGinn, "what is that buzzing noise?" He answered, "Must be power lines or something." She stated they thought the buzzing was coming from power lines that were running across the road (R. 636). McGinn testified that Gittens had noticed the humming and asked, "What is that buzzing?" McGinn answered, "It is high voltage." (R. 581) McGinn was an employee of Yates Electric at the time of the accident (R. 574A (missed in pagination)).

McNeil testified he could hear the power lines humming as he went to sleep (R. 665-666). He realized there was a power line between himself and the road (R. 668).

Omura admitted on cross-examination that she remembered being aware of power lines (R. 687).

Ricks testified he observed the "power lines" that were in the area west of Camp Lifton (R. 696). He stated he could hear the buzzing when he was down on the beach (R. 696). Ricks said he knew the buzzing sound meant there were some electrical lines in the area (R. 697).

McGinn had been sailing before with McNeil at Willard Bay. They launched the sailboat there from the public ramp (R. 628).

When they awoke the next morning at about eight-thirty, it was a clear day (R. 623). They put the sleeping bags in the car, then McNeil and McGinn drove west on the county road to a store and service station (R. 582-583). The county road is bordered on the north by the 230 KV line, on the south by the 12 KV line and goes under the 46 KV line approximately one and a half miles west of Camp Lifton (R. 781-782, P. 583-584, Exs. 34-D, 32-D). When McGinn and McNeil returned to the camp site, they decided to put the mast up on the sailboat and carry it down to the lake (R. 583). The mast is 26 feet long (R. 677; Exs. 47-D. 50-D). It can be "stepped" while the boat is on the trailer or on the beach (R. 660-661). After the mast was in place, Ricks and McNeil got on one side of the boat, McGinn, Omura and Gittens got on the other side and they proceeded to carry the 315 pound boat toward the lake (R. 584). As they carried the boat toward the lake, the mast hit the 46 KV line (R. 584). There are weld marks about six inches down from the top of the mast where it hit the power line (R. 652; Exs. 53-D.

55-D). The electricity apparently went through the aluminum mast, an aluminum tiller, then through McGinn to ground. The accident happened at about 9:38 a.m. (R. 742, P. 521). The point where the mast hit the power line was 193 feet west of the two poles (structures) shown on the right hand side of Exhibits 37-D and 43-D. The red and yellow fiberglass measuring pole in Exhibits 37-D and 43-D is located at the approximate point where the mast struck the power line (R. 711, P. 489). The power line was 29 feet one inch above the ground at this point (R. 712, P. 490).

McGinn was taken to the hospital in Montpelier, Idaho, and then to the University of Utah Medical Center in Salt Lake City.

At the conclusion of all the evidence, the court ruled that McGinn was not a trespasser as a matter of law; that the jury would *not* be advised of the effect of their answers to the questions involved; that plaintiff could amend the general prayer from $350,000 to $500,000 and that there was insufficient evidence to submit an issue of punitive damages to the jury (R. 815). Defendant's motion for a directed verdict was denied (R. 895). The case was submitted to the jury on the issue of the defendant's and plaintiff's negligence. The jury returned a special verdict as follows: (R. 88).

SPECIAL VERDICT

We, the jury, find, by a preponderance of the evidence, in this case the following answers to the questions propounded to us:

QUESTION NO. 1. Was the defendant Utah Power & Light Company guilty of negligence which was a proximate cause of plaintiff's injuries?

Yes X No

QUESTION NO. 2. Was the plaintiff F. William McGinn II guilty of negligence which was a proximate cause of his injuries?

Yes X No

If you answer "yes" to either of the prior questions, then answer the next questions.

QUESTION NO. 3. Considering all the negligence that caused the accident to be one hundred percent, what percentage is attributable to:

(a)	The defendant Utah Power & Light Company	40%
(b)	The plaintiff F. William McGinn	60%
	TOTAL:	100%

QUESTION NO. 4. Disregarding any of the previous answers, what is the total amount of damages sustained by plaintiff F. William McGinn II as a result of the incident?

(a)	General damages including lost wages	$150,000.00
(b)	Special damages	$ 18,150.00
	TOTAL:	$168,150.00

/s/ Marie H. McDonald
Foreman

Date: December 3, 1973

Based on the jury's answers to the special verdict, the court entered judgment of no cause of action (R. 81). Defendant's motion to strike the affidavits or in the alternative to obtain counteraffidavits was denied (R. 15). Plaintiff's motion for new trial was granted on the grounds the jury should have been advised of the affect of the comparative negligence and should have been advised there is no relationship between the damage answer and the percentages (R. 16). Defendant's petition to this court for an interlocutory appeal was granted (R. 2).

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL.

Under the Idaho comparative negligence law, a jury should not be informed of the effect their answers to the special verdict will have on the final outcome of the case.

Before the trial in this case commenced, the parties, through their respective counsel, agreed that since this accident occurred on the Idaho side of Bear Lake, this matter would be tried under the Idaho comparative negligence law. During the trial, a question of law arose relating to whether or not the jury should be informed of the effect of their answers to the special interrogatories which would be submitted under the provisions of the Idaho comparative negligence law. Although there was no controlling Idaho decision on this issue to guide the trial judge at the time of the

trial, (November 26 through December 3, 1973) he followed the general rule that the jury should not be informed of the effect of their answers to the special interrogatories. However, on March 7, 1974, the Supreme Court of Idaho in *Holland v. Peterson,* ..... Idaho ....., 518 P.2d 1190 (1974) ruled that in a case tried under comparative negligence, the trial court must not instruct the jury as to what effect their answers will have on the final outcome of the case.

> "Appellant's final assignment of error is that the trial court erred in instructing the jury that they should not concern themselves with whether their answers to the interrogatories submitted to them would be favorable to one party or another. *The general rule, and the one that we adopt today, is that it is reversible error for the trial court to instruct the jury as to the effect their answers will have on the final outcome of the case.* See Annot. 90 ALR2d 1041, (1963). Of course, it may not always be possible to frame the interrogatories in language that won't tend to inform the jury of the effect, but they should never be instructed what it will be." (Emphasis added)

The Idaho Supreme Court's decision on this issue is in accord with nearly all of the other comparative negligence jurisdictions. Wisconsin clearly does not permit the jury to be informed of the effect of its answers to the special verdict. *Fehrman v. Smirl,* 121 N.W.2d 255 (Wis. 1963) was a malpractice case where the judgment for the defendant was reversed because of instructions which tended to inform the jury of the result of its answers to the special verdict. The instruction read:

> "You are further insrtucted that it is the duty of the patient to follow the reasonable instructions and submit to the reasonable treatment prescribed by his physician or surgeon. If he fails in his duty, and his act or omission directly contributes to the injury or disability, *he cannot maintain an action* for malpractice against his physician or surgeon, who is also guilty of an act or omission in treating the case." *Id.* at 265.

The Supreme Court of Wisconsin stated:

> "Furthermore, because of the use of the phrase 'cannot maintain an action for malpractice,' this instruction is highly objectionable because it tends to inform the jury of the legal effect of their answer to a question of the special verdict.
>
> Two other attacked instructions, which were given with respect to the jury's answering Question One of the special verdict, were also objectionable because couched in terms which tended to inform the jury of the legal effect of answering Question One of the special verdict 'yes.' " *Id.* at 265.

In *Erb v. Mutual Service Casualty Company*, 123 N.W.2d 493 (Wis. 1963), the attorney for the plaintiff informed the jury in his argument that if it answered a special interrogatory regarding whether an automobile had been sold in the affirmative, the insurance policy on the automobile would be void. The Wisconsin Supreme Court held the attorney's comment "indefensively improper" and stated:

> "The argument of counsel, however, was calculated to inform the jury of the effect of their answer, and under the facts in the instant action were sufficiently prejudicial so as to affect the

> substantial rights of Mutual Service, warranting the granting of a new trial. . . . *Id.* at 469.

In *Gardner v. Germain*, 117 N.W.2d 759 (Minn. 1962), an automobile death case, the court held that it was reversible error to disclose to the jury the legal effect of the findings when a special verdict is employed. Accordingly, the court could not be concerned with what the jury hoped the outcome of the case would be and could not grant a new trial based upon a juror's affidavit that when the jury found both the plaintiff and the defendant negligent, it believed the plaintiff would recover. See also *McCourtie v. United States Steel Corp.*, 93 N.W.2d 552 (Minn. 1958); *Flick v. Walfinger*, 198 N.W.2d 146 (Minn. 1972); and *Johnson v. O'Brien*, 105 N.W.2d 244 (Minn. 1960).

In *Harbison v. Briggs Bros. Paint Manufacturing Co.*, 354 S.W.2d 464 (Tenn. 1962), an action for personal injuries, the court analyzed the Tennessee special verdict statute and held that "it is error for the judge to inform the jury of the effect their answers may have upon the case because such information would almost necessarily defeat the object to be secured by the answers to such interrogatories." *Id.* at 471.

Argo v. Blackshear, 416 S.W.2d 314 (Ark. 1967) was an action by the parents of a deceased child against a motorist who struck and killed the child as she ran across the highway. The case was submitted to the jury under a special verdict as required by the Arkansas comparative negligence statute. The jury returned with

a finding of equal negligence on both the plaintiff and defendant. The attorney for the plaintiff then requested that the trial judge ascertain whether the jury intended for the parents to recover. The judge then informed the jury that, under the law, the finding of equal negligence barred any recovery by the plaintiffs. The jury then returned a verdict in favor of the plaintiffs. The Arkansas Supreme Court reversed and held that it was error for the trial judge to specifically inform the jurors of the effect on the ultimate judgment of their answers to the specially submitted questions. The court stated:

> "When the jury was polled and further questioned by the judge as to their intentions in answering the interrogatories, at no place did they retract the findings on total damages and apportionment of negligence. The only additional information supplied was to the effect that they wanted to see plaintiffs recover the full $18,000. This pointedly illustrates the value of interrogatories. Jurors honestly answer four relatively simple questions, not knowing the legal effect will be contrary to their personal wishes. Additionally, this situation justifies the rule that for the judge to specifically inform the jurors as to the effect of their answers on the ultimate judgment is reversible error. 90 A.L.R.2d 1041. As said by this court in *Wright v. Convey*, 233 Ark. 798, 349 S.W.2d 344 (1961): 'The reason for the rule is that the special interrogatories are intended to elicit the jury's unbiased judgment upon the issues of fact, and this purpose might be frustrated if the jurors are in a position to frame their answers with a conscious desire to aid one side or the other.' "

See also *International Harvester Co. v. Pike*, 466 S.W.2d 901 (Ark. 1971) where the court reversed and remanded a judgment for the plaintiff on the basis that it was error for the plaintiff's attorney to advise the jury that an affirmative answer to the assumption of risk interrogatory would preclude recovery by the plaintiff.

The only case which appellants have been able to locate that holds the jury should be informed of the effect of their answers to the special verdict interrogatories is a decision by an intermediate court in Colorado, *Simpson v. Anderson*, (Docket No. 73-009, Colorado Court of Appeals, 1973). This case is currently on appeal to the Colorado Supreme Court, but there has been no decision by that court as of the date of this brief. Therefore, this Colorado intermediate appellate court's decision should not be taken as reliable precedent, especially when compared to the well reasoned decisions from courts of final determination, including Idaho's, which directly contravene this case.

The leading work in the field of comparative negligence is the *Comparative Negligence Manual*, a practical treatise of the law in this area. This book was written by two of the leading experts in comparative negligence law, Carroll R. Heft and C. James Heft. These two practicing Wisconsin attorneys have wide experience in working with comparative negligence, since Wisconsin has had a law similar to Idaho's and Utah's for many years. The authors of this treatise state that a jury should act solely as a fact finding body

and should not be informed of the legal effect of its answers.

> "The special verdict is the very cornerstone of the comparative negligence concept, and the jury does not, and should not, know the legal effect and result of its answers to the interrogatories.
>
> By using the procedure of a special verdict under comparative negligence, a jury finds the facts without regard to the ultimate outcome of the case. The court takes the facts as found by the jury and awards judgment. The procedure is intended to ascertain the truth untainted by prejudice or desire to see one of the parties win or lose." . . . *Id.* Section 8.10, chapter 8, page 1.
>
> "It is obvious that meticulous care should be exercised in *not* informing the jury of the effect of their answers upon the final outcome of the case. Care must be exercised by counsel in argument. Care must be exercised by the court in the wording of the questions and in the instructions.
>
> It is one of the cornerstones of comparative negligence that the jury be limited to a fact finding body. The interpretation of those facts is for the court. Likewise, the application of the apportionment question to the entire damages found by the jury is likewise the duty of the court in the doing of the mathematics." *Id.* Section 7.40, chapter 7, page 6.

CONCLUSION

Appellant respectfully submits that ***Holland v. Peterson***, the Idaho comparative negligence case discussed *supra*, is controlling in this case. When this recent Idaho decision is considered, together with all the

other precedent from comparative negligence jurisdictions, it is clear that one of the fundamental bases of comparative negligence with its special verdict provisions is that the jury should act solely as a fact finding body. They should make their factual determinations without the sympathy, bias and prejudice which would be inherent if the jury knew the plaintiff could not recover unless they found the defendant at least 51% negligent. In *McGinn v. Utah Power & Light*, the jury, acting as fact finders, determined that the plaintiff was guilty of the greater negligence. Unaware of the effect their answers would have on the damages awarded, the jury made a clear determination that the plaintiff was guilty of the greater fault. Under the Idaho comparative negligence law, as under the new Utah comparative negligence law, the plaintiff recovers nothing when the jury determines that he was guilty of the greater negligence. On this basis, the trial judge's grant of a new trial should be reversed and the jury verdict and judgment of no cause of action reinstated.

Respectfully submitted,

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